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In the Supreme Court of the United States

BRANDON WADE HEIN, ET AL.,
PETITIONERS,

v.

WILLIAM JOSEPH SULLIVAN, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

It is now apparent why Respondents initially waived their opposition, leading this Court to call for a response. Respondents are forced to concede that there is a circuit split, and merely attempt to minimize it by suggesting that some key decisions do not mean what they plainly say. This Court's clearly established precedent forbids prosecutors from knowingly deceiving juries with misleading testimony. The Ninth Circuit and several others are inviting prosecutors to play unconscionable games on the line between "mere" intentional deception and outright perjury. This issue potentially affects every criminal case in this country. Review is warranted.

1. Respondents take creative license with the Ninth Circuit's decision, claiming that it "appears to assume that misleading evidence can constitute a *Napue* violation." Opp.5. To the contrary, the Ninth Circuit was crystal clear that testimony must be "'actually false.'" Pet.App.18a (quoting *United States v. Zuno-Arce*, 339 F.3d 886, 889 (9th Cir. 2003), *cert. denied*, 540 U.S. 1208 (2004)); Pet.App.26a n.11 (reiterating that "the testimony must still be actually false") (citing *Hayes v. Brown*, 399 F.3d 972, 980-82 (9th Cir. 2005) (*en banc*)).

The Ninth Circuit acknowledged that McLoren's statements were "incomplete" and could be "viewed with some skepticism," Pet.App.19a, 25a, but once the court of appeals decided that those statements were "accurate," Pet.App.19a, it did not go on to consider whether his testimony was nonetheless misleading. The Ninth Circuit's entire *Napue* analysis centered on the issue of literal falsity. *See, e.g.*, Pet.App.20a ("none of these statements were false"); Pet.App.21a-22a

("testimony ... was clearly not false"); Pet.App.22a ("testimony ... was not false"); Pet.App.25a ("none of these statements are false"); *id.* (alternative reasons for testifying were not "facially false"); Pet.App.27a ("testimony was not false"). And the Ninth Circuit's hyper-technical parsing of McLoren's statements and speculation about far-fetched ways that they could be understood as literally true betrays that it had no interest in assessing whether that evidence actually gave the jury a misleading impression, in context. (Respondents' similar gyrations, *e.g.*, Opp.18-22, illustrate the same point.)

2. Respondents concede that there is a circuit split, and even point this Court to an intervening Ninth Circuit decision that expressly acknowledges it. *See* Opp.7-8 (quoting *Towery v. Schriro*, No. 08-99022, 2010 WL 5157357, at *6 (9th Cir. Sep. 22, 2010), *as amended*, Dec. 21, 2010). Their efforts to minimize the scope or importance of that split are unpersuasive.

First, Respondents are wrong to suggest that *Towery* introduces any ambiguity into Ninth Circuit law. The *Towery* panel acknowledged in *dicta* the circuit conflict over whether "accurate testimony could be delivered in a sufficiently misleading context to make the evidence false for *Napue* purposes," citing only out-of-circuit case law. *Towery*, 2010 WL 5157357, at *6. Its only discussion of *Ninth Circuit* law on this point was to quote *Zuno-Arce*, 339 F.3d at 889, to the effect that the testimony must be "'actually false.'" *Id.* And the Ninth Circuit subsequently re-affirmed its actual falsity requirement in *Hayes v. Ayers*, No. 07-99014, 2011 U.S. App. LEXIS 458, at *42-44 (9th Cir. Jan. 7, 2011). In *Hayes*, the court excused the witness's "mostly equivocal" testimony about when she received

immunity, holding that "[t]he prosecution had no obligation to correct Garcia's qualified testimony about her own reasonably held belief, because it was not actually false." *Id.* at *43-44.[1]

Second, Respondents try to obfuscate the Sixth, Eighth, and Eleventh Circuit cases clearly holding that literal falsity is required, by suggesting that "all (save perhaps one case) involve situations where the evidence apparently was *not* misleading, so the articulation of the legal standard made no practical difference." Opp.9. That claim is speculative and unpersuasive on the facts; the truth is that those cases do not analyze whether any misleading testimony was present, because the courts did not think that question relevant. But several clearly did involve testimony that was at least arguably misleading.[2]

More importantly, Respondents' entire discussion rests on the false premise that the holding of a case is somehow defined by the narrowest rationale for the result that a creative lawyer can hypothesize, rather

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[1] Respondents cite *United States v. Ramirez*, 608 F.2d 1261, 1266 n.9 (9th Cir. 1979). Whatever force the *Ramirez* footnote may have had at the time has faded in the intervening thirty years and been clarified by *Zuno-Arce* and its progeny.

[2] *See, e.g.*, *Hammond v. Hall*, 586 F.3d 1289, 1306 (11th Cir. 2009) (witness testified that she "had never been arrested or spent a single day in jail," even though the State had evidence "implicating her in several violent crimes"), *cert. denied*, 131 S. Ct. 917 (2011); *Byrd v. Collins*, 209 F.3d 486, 517-18 (6th Cir. 2000) (unclear whether witness's testimony regarding pending charges referred only to criminal charges); *Pederson v. Fabian*, 491 F.3d 816, 828 (8th Cir. 2007) (finding "ambiguity inherent in [the witness's] statement"); *United States v. Lochmondy*, 890 F.2d 817, 823 (6th Cir. 1989) (statement by witness "may have been inconsistent with other evidence presented in the case").

than by the reasoning the court actually gave. The law does not work that way. "When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound." *Seminole Tribe v. Florida*, 517 U.S. 44, 67 (1996); *see also Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 668 (1989) ("As a general rule, the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law.") (Kennedy, J., concurring in judgment in part and dissenting in part).

The Sixth, Eighth, and Eleventh Circuit decisions are crystal clear that to prevail "the defendant must show that the statement in question was 'indisputably false,' rather than merely misleading." *Byrd v. Collins*, 209 F.3d 486, 517 (6th Cir. 2000); *see also Pederson v. Fabian*, 491 F.3d 816, 828 (8th Cir. 2007) (considering only *Napue* claims where the statements are "unambiguous and false"); *Smith v. Sec'y, Dep't of Corr.*, 572 F.3d 1327, 1335 (11th Cir. 2009) ("Accurate statements do not violate the *Giglio* rule.").[3] The district courts and subsequent panels in those circuits are bound by that rule. Respondents' speculation that

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[3] The Tenth Circuit may be in the minority as well. *See Cole v. Zavaris*, No. 07-cv-01197-WDM-MJW, 2009 U.S. Dist. LEXIS 54457, at *57 (D. Colo. June 4, 2009) ("Significantly, a habeas petitioner must show that a witness'[s] statement was 'indisputably false,' rather than misleading, to establish a denial of due process based on the knowing use of false or perjured testimony.") (quoting *Byrd*, 209 F.3d at 517-18), *appeal denied*, *Cole v. Zavaras*, 349 F. App'x 328 (10th Cir. 2009).

the panels in some of those cases *could* have reached the same result by another route is irrelevant.[4]

Third, Respondents commit similar errors when discussing the circuits on the other side of the split.

Respondents concede that the First, Fourth, and Fifth circuits have found *Napue* violations "on the basis of accurate but misleading evidence," Opp.10, but contend that none of those cases arose in a habeas context. That is factually wrong—at a minimum, both *Tassin v. Cain*, 517 F.3d 770, 776 (5th Cir. 2008), and *Monroe v. Angelone*, 323 F.3d 286, 297 (4th Cir. 2003), were habeas cases decided under 28 U.S.C. § 2254(d)—and irrelevant. None of the courts of appeals had any trouble identifying and applying this Court's clearly established precedent. *See, e.g.*, *Tassin*, 517 F.3d at 778 ("*Giglio* and *Napue* set a clear precedent ...."); *United States v. Casas*, 425 F.3d 23, 44 (1st Cir. 2005) (finding the "at best, misleading" testimony in violation of *Giglio*), *cert. denied*, 546 U.S. 1199 *and* 547 U.S. 1061 (2006); *United States v. Sutton*, 542 F.2d 1239, 1243 (4th Cir. 1976) ("[A]s in [*Napue*], here the prosecution allowed a false impression to be created at trial ...."). Nor do Respondents support their bald statement that the cases are distinguishable because they involved "factual settings where the evidence was intentionally and highly misleading, not merely subject to possible misinterpretation." Opp.11. As explained in our Petition, *see* Pet.29-34, many of these cases involved

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[4] Respondents' reliance on older cases in these circuits, Opp.10, is no more persuasive than its citation to *Ramirez* in the Ninth Circuit. *See supra* n.1. These circuits obviously no longer follow those decisions and the fact that several circuits have struggled with this issue over time only highlights the wide-spread confusion and disarray justifying review by this Court.

fact patterns just like this one, where prosecutors intentionally concealed immunity or lenient treatment afforded to their witnesses.

Respondents argue that the Second, Third, Seventh, and D.C. Circuit cases involved false or inaccurate statements as well as misleading ones. Opp.11-12. Cases can certainly involve *both* misleading and false testimony, but nothing in those cases indicates that the courts required actual falsity in order to reverse under *Napue*. Once again, Respondents try to put their own gloss on the underlying *facts* in these cases while ignoring the reasoning the courts actually gave for their decisions. *See, e.g., United States v. Iverson*, 637 F.2d 799, 805 n.19 (D.C. Cir. 1980) (noting that a prosecutor must correct testimony regardless of whether it is "technically perjurious *or* merely misleading") (emphasis added). Respondents employ parentheticals to identify certain statements as "inaccurate" when the court actually identified them as misleading. *See, e.g., Jenkins v. Artuz*, 294 F.3d 284, 294 (2d Cir. 2002) (prosecutor elicited "technically accurate testimony" that created a "false impression"); *United States v. Morris*, 498 F.3d 634, 640 (7th Cir. 2007) ("Here, the prosecutor's *misleading statement* ran the *risk* of facilitating untruthful testimony from Peterson ....") (emphasis added), *cert. denied*, 553 U.S. 1065 (2008).

3. Respondents seek to bar review of Petitioners' claim under 28 U.S.C. § 2254(d) by asserting that "this Court has never held that the prosecution's constitutional obligations entail not only correcting false evidence, but also any evidence tending to mislead." Opp.13. But this Court has repeatedly

characterized evidence with a tendency to mislead as "false" for *Napue* purposes.

As the petition explained, the witness's testimony in *Alcorta v. Texas* that he had never gone on "dates" with the defendant's wife and that they were not "in love" may have been literally true. 355 U.S. 28, 29-31 (1957). This Court held that a new trial was necessary because "Castilleja's testimony, *taken as a whole*, gave the jury the *false impression* that his relationship with petitioner's wife was nothing more than a casual friendship," when in fact they had a sexual relationship. *Id.* at 31 (emphasis added). Respondents try to make the testimony seem literally false by asserting that "the Court cited the witness's testimony that 'his relationship with petitioner's wife had been only that of a friend and neighbor, and that he had had no dates, nor other relations with her.'" Opp.14 (citing *Alcorta*, 355 U.S. at 30). But that quote is not from Castilleja's actual testimony; it is an embellishment drawn from the defendant's habeas petition in *Alcorta*. *See* 355 U.S. at 30. Of course the defendant in *Alcorta* was interested (like Respondents here) in making Castilleja's testimony seem even more misleading and literally false than it actually was. This Court saw no need to parse Alcorta's characterization or hunt for literal falsity in Castilleja's testimony; it was enough that the actual quoted portions of that testimony gave the jury a "false impression."

Giglio v. United States, 405 U.S. 150 (1972), involved a combination of misleading half-truths by a witness and a statement by the prosecutor that was literally false. Respondents emphasize the prosecutor's false statement and downplay the witness's misleading testimony, Opp.14, but this Court's reasoning drew no

such distinction. Regardless, a prosecutor in this case (Latin) made an equally false statement in summation that similarly sharpened the misleading character of McLoren's prior testimony. *See* Pet.12. Latin's statement, in combination with McLoren's testimony, was no less an instance of "deliberate deception" of the court and jury than occurred in *Giglio*. 405 U.S. at 153.

Finally, Respondents overstate the distinction between non-disclosure cases based on *Brady* and false testimony cases based on *Napue*. *See* Opp.15. A plurality of this Court has identified the common roots of the two doctrines, *see United States v. Bagley*, 473 U.S. 667, 678-79 & n.8 (1985), and rejected the excuse that "technically correct" statements would insulate "misleading[]" representations by the Government, *id.* at 684.

4. Judging from their question presented, Respondents do not seriously deny that McLoren's testimony was fundamentally "misleading." Instead, Respondents rehash the same literal falsity analysis put forth by the Ninth Circuit, which our Petition addressed. *See* Pet.20-25. They also raise a few novel arguments which we address below.

First, Respondents suggest for the first time that McLoren's claim that his lawyer gave him no assurances that he would not be prosecuted was not false because the question was limited to McLoren's state of mind prior to the immunity agreement. Opp.18-19. But a simple review of the exchange shows the question had no temporal limitations, Pet.8-9, and even the Ninth Circuit did not suggest otherwise.[5]

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[5] Respondents may be confused because the Ninth Circuit elected to review this statement collectively with earlier

Second, Respondents argue that McLoren's answer was not false because his immunity deal did not require him to give favorable testimony. Opp.19. That is a non-sequitur and does not bear on McLoren's claim that he was exposing himself to prosecution. Although Respondents try to hypothesize scenarios in which McLoren's answer could literally be true, they do not even attempt to argue that a jury would understand it as anything other than an outright denial that McLoren had received immunity.[6]

Third, Respondents also change course on the issue of DDA Latin's statement in closing argument that McLoren's testimony exposed him to "criminal liability." Pet.App.130a-31a. In conflict with the Ninth Circuit, Respondents now acknowledge that *Giglio* held that a prosecutor's false statement in closing argument is relevant to the falsity inquiry. Opp.14. However, Respondents then backtrack on their concession below that Latin's statement was "certainly incorrect," and embrace the Ninth Circuit's speculation that Latin might have been referring to a potential prosecution for perjury. *Compare* Opp.22 *with* Pet.23-25. The Petition explained why that theory is absurd and dangerous, Pet.24, and Respondents offer no

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testimony from McLoren that related to a specific meeting with two police officers. Pet.App.20a-21a.

[6] Respondents suggest that the prosecution would not have known that McLoren was lying because it was not privy to conversations between McLoren and his lawyer. This suggestion is facially wrong—since DDA Semow admitted to meeting with both McLoren and his lawyer to work out the terms of the immunity agreement, Pet.App.126a-27a—and legally irrelevant as the prosecution would have a duty to correct testimony it knew to be false, even if Semow and McLoren's attorney had, for some unknown reason, conspired to keep McLoren in the dark.

serious contrary argument. In context the jury plainly would have understood Latin's comment as referring to a potential marijuana prosecution.

The false evidence in this case is self-evident. McLoren refused to testify absent immunity for his marijuana dealing, yet told the jury that he had received no assurances and was testifying out of a sense of loyalty to his dead friend, even if it meant that he had to "take the drug charge." Pet.5, 7-11. Whether or not McLoren managed to skirt outright perjury, there is no question that his testimony, taken as a whole, left the jury with the false impression that he was testifying to his detriment in order to see justice done. The prosecution knew full well that the jury had been deceived, and cemented that deception in its closing statement.

5. Respondents concede that false testimony is material if it "*could* have affected the judgment of the jury." Opp.23 (citing *United States v. Agurs*, 427 U.S. 97, 103 (1976)) (emphasis added). This is one of the most lenient materiality standards known to the law, and it plainly is satisfied here.

First, Respondents claim that McLoren's motivation for testifying somehow was beyond challenge because he "consistently reported that petitioners came to the fort to rob him." *Id.* But McLoren's story changed several times, and on more than one occasion he described the incident as a "fight" without mentioning a theft at all. Pet.5 & n.5. The cause of the fight was a hotly disputed issue, McLoren's credibility was the central issue at trial, and with knowledge of the immunity agreement the jury may have believed that McLoren manufactured the

robbery story in order to protect his deal with the prosecution.

Second, Respondents assert that "McLoren's credibility was significantly impeached at trial." Opp.24. But the evidence Respondents cite—that McLoren "changed his testimony only after retaining counsel to deal with the marijuana issue" (Opp.25)—is precisely why it was so critical for the jury to learn how the "marijuana issue" was resolved. If McLoren chose to testify despite his fear of legal liability, it lends him enormous credibility. If, however, he only testified after receiving immunity, the jury would be more skeptical of his account. Given that the entire case boiled down to McLoren's testimony, any evidence touching on his potential bias was material. *See* Pet.26-27.

Third, Respondents contend that McLoren's testimony "was supported by substantial, independent evidence." Opp.25. But most of the "evidence" Respondents cite cuts both ways. If Petitioners intended to rob McLoren, it made little sense to send the small, 15 year old Micah into the fort first. The spontaneity of the fight could just as easily be explained by the fact that all of the boys were intoxicated and McLoren was "'kind of angry.'" Pet.28 (citation omitted). And the robbery theory is undermined both by the fact that Petitioners did not actually take any marijuana.

CONCLUSION

In this case, four teenage boys (one only fifteen years old) were sent to prison for life because they lived in a circuit that has drifted away from this Court's clearly established precedent. The petition for certiorari should be granted.

Respectfully submitted,

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